LANKA MARITIME SERVICES LTD.
v
SRI LANKA PORTS AUTHORITY AND 6 OTHERS

COURT OF APPEAL
SALEEM MARSOOF, J. (P/CA)
SRISKANDARAJA, J.
CA 2173/2004
NOVEMBER 16, 2004

Writ of Certiorari – Maintainability – Another application relating to the same matter between same parties pending – Multiplicity of Actions – Interest reipublicae ut sit fins litium – Nemo debet bis vexari pro unq et eadem causa – Res Judicata – Judgments pro veritae accipitor – No judicial pronouncement – applicability of the above dicta. – Court of Appeal (Appellate Procedure) Rules 1990, Rules 3(2) – Constitution Article 12(1), 14(1), 140.

Held:

Per Saleem Marsoof, J. (P/CA)

"I am of the opinion that there is no Rule of Court or principle of law which precludes the filing of a fresh application with respect to the same subject matter as an existing application but the Court may in the context of a writ application take into consideration the fact of the existence of the earlier application in exercising its discretion in regard to whether any new material placed before Court in the later application should be rejected or any additional relief prayed for in the later case should be refused".

(1) It is trite law that the doctrine of *res judicata* precludes fresh proceedings only where there is a previous judicial decision on the same cause between the same parties.

When there is no proper judicial pronouncement (including withdrawal without reservation of the right to initiate proceedings) in a case involving the same parties and the same cause, a Court will not dismiss any fresh action or application in limine and will entertain the subsequent action or application.

APPLICATION for a Writ of *Certiorari* on a preliminary objection taken.

Cases referred to:

(1) *Jayawardane and five others* v *Dehiattakandiya MPCS and fifty others* – 1995 – 2 SLR 276.

(2) *Herath* v *Attorney-General* – 64 NLR 1923.

(3) *Mendis* v *Himmappooa* – 18432 – 1855 – Ramanathan Reports 88.

K. Kanag-Iswaran PC with *Nigel Bartholomeuze* for petitioner.

Wijedasa Rajapakse PC with *K. Liyanagamage and Rasika Dissanayake* for 1st, 2nd and 3rd respondents.

Romesh de Silva PC with *Harsha Amarasekera* and *S. Cooray* for 5th respondent.

Y.J.W. Wijayatilleke DSG with *Janak de Silva* , SC for 4th to 6th respondents.

Shibly Aziz PC for 7th respondent.

November 19, 2004

SALEEM MARSOOF, J.

When this application was supported for notice by learned President's Counsel for the Petitioner, learned President's Counsel for the 5th Respondent (Lanka Marine Services Pvt. Ltd. which had been noticed in view of the application for interim relief) took up a preliminary objection to the maintainability of the application on the basis that another application filed in this Court and now pending bearing No. CA Application 1534/2004, in which the Petitioner in the instant case is the 2nd Petitioner, relates to the same matter and creates a multiplicity of applications. In particular learned President's Counsel for the 5th Respondent drew the attention of Court to Rule 3(2) of the Court of Appeal (Appellate Procedure) Rules, 1990 which reads as follows-

"The petition and affidavit, except in the case of an application for the exercise of the powers conferred by Article 141 of the Constitution shall contain an averment that the jurisdiction of the Court of Appeal has not previously been invoked in respect of the same matter. If such jurisdiction has previously been invoked the petition shall contain an averment disclosing relevant particulars of the previous application. Where any such averment as aforesaid is found to be false or incorrect the application may be dismissed."

He submits that although in paragraph 90 of the petition filed in this case, the Petitioner has disclosed that the jurisdiction of this Court has previously been invoked by the Petitioner in CA Application No. 1534/2004 together with two other parties, namely the Sri Lanka Shipping Company Ltd. and the Lanka Bunkering Services (Pvt) Ltd. the objective of the said Rule 3(2) is to avoid multiplicity of applications

and that as the said application and the present application relate to the same matter, the present application has to dismissed in *limine*. In this context, he submits that the policy of the law as well as the aforesaid Rule is that no one should be vexed twice in connection with the same matter and he cites the judgment in *Jayawardena and Five Others* v *Dehiattakandiya Multi-Purpose Co-operative Society Ltd. and Fifty Others*(1) in which S.N.Silva, J. (as he then was) has observed at 281 that "It is thus seen that it is in the public interest that a party should not be vexed twice upon litigation in respect of the same matter. The Supreme Court Rules have clearly an underpinning of the aforesaid element of public interest. It is for that reason that the Rules require a petitioner to state that he has not invoked the jurisdiction of the court previously in respect of the same matter."

Learned President's Counsel appearing for the 1st, 2nd, 3rd Respondents states that he associates himself with the submission of learned President's Counsel for the 5th Respondent and states that the Petitioner itself has admitted in Paragraph 90 of its petition that the two cases relate to the same matter. Paragraph 90 of the petition is quoted below:

"The Petitioner states that they have not previously invoked the jurisdiction of Your Lordship's Court in respect of this matter except in the matter of CA Application 1534/2004 together with Sri Lanka Shipping Company Limited and Lanka Bunkering Services (Pvt) Ltd."

Learned President's Counsel appearing for the 1st, 2nd, 3rd Respondents further submits that the present application is based on the letter dated 15th July 2003 (P17) which is a licence issued to the Petitioner by the Minister of Power and Energy in terms of Section 5(4) of the Petroleum Products (Special Provisions) Act No. 63 of 2002, and although the substantive relief prayed for by the Petitioner in subparagraphs (b), (c), (d), (e) and (f) of the prayer to the Petition have been sought by reference to the said document, the said licence does not bind the 1st Respondent Sri Lanka Ports Authority or the 2nd and 3rd Respondent officials of the said Authority. He also points out that the very same document has been the basis of the previous application bearing reference CA Application No. 1534/2004 in which it has been tendered marked P16. He further submits that the *certiorari* prayed for in sub-paragraph (d) of the prayer and the

mandamus prayed for in subparagraph (c) of the prayer to the present application are in substance the same reliefs prayed for by prayers (c) and (d) in CA application 1534/2004. He also submits that although a declaration has been sought by sub paragraph (c) of the prayers of the petition, the Petitioner has sought to invoke the jurisdiction of this Court in terms of Article 140 of the Constitution which does not confer any jurisdiction to grant a declaration. He further submits that the prohibition sought by sub paragraphs (f) of the prayer to the present petition could and should have been prayed for in the previous application, and that the failure to plead that relief in the previously filed application cannot be remedied by filing a fresh application. He also submits that the Petitioner could seek the said relief in CA Application No. 1534/2004 itself as the case is still pending and is in fact listed for argument on 19th November 2004.

Leaned President's Counsel appearing for the Petitioner states that Rule 3 (2) of the Court of Appeal (Appellate Procedure) Rules, 1990 only requires the disclosure of any previous applications filed in this Court or in any other form relating to the same matter, but does not preclude a fresh application being filed as in this case where new material has surfaced. He submits that it is extremely material to his case that the 6th Respondent (Attorney-General) has issued a legal opinion in his letter dated 3rd March 2004 in response to a query raised by the Energy Supply Committee in its letter dated 9th December 2003. In paragraph 84 of the Petition filed in this case the Petitioner has quoted extensively from the said legal opinion of the 6th Respondent. In particular, learned Counsel for the Petitioner highlights the fact that the 6th Respondent has ruled that insofar as the 5th Respondent operates barges to transport fuel within the Colombo Port, any refusal to permit other barge owners to transport bunker fuel by barge would be a violation of the fundamental rights enshrined in Article 12 (1) and Article 14(1) of the Constitution. He submits that the existence of the said legal opinion has been suppressed by the Respondents in CA Application 1534/2004 and that in the circumstances it has become necessary for the Petitioner to seek "the aid and assistance" of this Court to petition for the relief prayed for by the Petitioner. He further submits that the petitioner has satisfied Rule 3(2) as it has disclosed the fact that a previous application has been filed with respect to the same matter, but further submits that there is no rule of Court that gives effect to the alleged

principle against the multiplicity of applications. Learned President's Counsel for the Petitioner also submits that principles of *res judicarta* have no relevance to the matter in issue as those principles preclude the filing of a fresh action or application after the matter in dispute has been put to rest by a decision of a Court of law which is not the case here as CA Application No. 1534/2004 is still pending before this Court

I am of the opinion that there is no Rule of Court or principle of law which precludes the filing of a fresh application with respect to the same subject matter as an existing application, but the Court may in the context of a writ application take into consideration the fact of the existence of the earlier application in exercising its discretion in regard to whether any new material placed before Court in the later application should be rejected or any additional relief prayed for in the later case should be refused. In *Jayawardena and Five Others* v *Dehiattakandiya Multi Purpose Co-operative Society Ltd. and Fifty Others (supra)* S.N. Silva, J. made the following pertinent observation at 281 to 282-

"The contents of Rule 47 and Rule 3(2) referred above appear to be based on the doctrine of *res judicata* is meant the termination of the controversy by a judgment of a Court. This is accomplished either by an adverse decision or by discharge from liability. In the case of *Herath* v *Attorney-General*[2], a bench of 3 Judges of the Supreme Court considered the implications of this doctrine. Basnayake, CJ. cited an authority which expresses the view that the doctrine is founded upon the maximum "*nemo debet bis vexaripro una et eadem causa* which is itself an outcome of the wider maxim *interest reipubiicae ut sit finis litium* (page 217). It is thus seen that it is in the public interest that a party should not be vexed twice upon litigation in respect of the same matter. The Supreme Court Rules have clearly an underpinning of the aforesaid element of public interest. It is for that reason that the Rules require a petitioner to state that he has not invoked the jurisdiction of the Court previously in respect of the same matter. The basic assumption is that if a party has invoked the jurisdiction of the Court previously in respect of the same matter, he is barred from invoking the jurisdiction for the second time, save in exceptional situations as noted above. If this principle is not applied, it would happen as in this case, where a party who has withdrawn his earlier application without any reservation retains another Counsel and makes a second foray to this Court by way of a fresh application."

It is trite law that the doctrine of *res judicata* precludes fresh *proceedings only where there is a previous judicial decision on the same cause between the same parties.* It is common ground that there is no prior judicial pronouncement to thwart the application made by the Petitioner in this case. The question for determination on the preliminary objection taken on behalf of some of the Respondents is whether the wider maxim *interest reipubiicae ut sit finis litium* which when converted to contemporary language would mean that "it is in the public interest that there should be an end to litigation" would preclude the Petitioner from maintaining the present application. The said maxim was considered in the old case of *Mendis* v *Himmappooa*(3) in which the record revealed that the plaintiff has twice already brought the identical action, and has twice been absent on the date of the trial, and the case has already been twice dismissed. Stark J. considered the maxim, and observed-

"*interest reipubiicae ut sit finis litium* is a good maxim; it flows out of the very nature of society, for unless there is an end to litigation, rights would for ever remain uncertain and no man would ever enjoy that security of person and property, without some degree of which society could not subsist, and it may be added, in proportion to the enjoyment of which in any society civilization advances, or has opportunity to advance.

Accordingly, it is a rule of law that a solemn judgment on any matter standing *pro veritate accipitur.* But this effect cannot attach to a judgment given without a hearing of the case, which appears to be the predicament in which the subject-matter of the present suit is placed. If the judgments in the previous cases were in respect of the absence of the plaintiff, and so of the nature of nonsuits without evidence taken in the cause, they do not amount to *Res Judicata*, which is properly defined as legal judgment on the same point between the same parties, on the same grounds or *media concludendi* after argument or confession."

It will follow from this decision that where there is no prior judicial pronouncement (including a withdrawal without reservation of the right to initiate fresh proceedings) in a case involving the same parties and the same cause, a Court will not dismiss any fresh action or application in *limine*, and will entertain the subsequent action or application.

For the foregoing reasons, the preliminary objection taken up by learned President's Counsel for the 1st, 2nd, 3rd and 5th Respondents is overruled, without prejudice to any other objections to the maintainability of the application that may be taken by the Respondents, if so advised.

SRISKANDARAJAH, J. – I agree.

Preliminary objection overruled.

Matter set down for argument.